United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7406

B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7406

EUGENE LEWIS, GLADYS CROOM, etc.

Plaintiffs-Appellees,

P/s

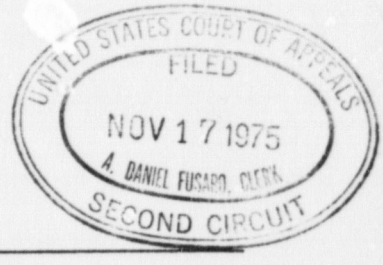
v.

JOSEPH A. WALSH, etc., et al

Defendants,

PETER FREER and FRANCIS MATTHEWS,

Defendants-Appellants



APPEAL FROM VERDICT AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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3

INTRODUCTION

The defendants hereby reply to the plaintiff, John Croom's, brief in the order of the issues presented by the plaintiff.

I

IS IT FOR THE JURY, AFTER HEARING ALL THE EVIDENCE, TO DETERMINE IF A SPECIAL DEFENSE OF GOOD FAITH BELIEF THAT AN ARREST WAS JUSTIFIED IS TO BE BELIEVED?

The main thrust of plaintiff's argument is that it was within the jury's province to find the issue of the defendants' good faith belief either way. This avoids the issue raised by the defendants that the plaintiff's own testimony and that of their witnesses combined with the factual findings underlying the jury's resolution of the entry issue in the defendants' favor, constitute an overwhelming weight of evidence in the defendants' favor on the arrest issue.

Unfortunately for the sake of clarity of analysis, the plaintiff accompanied his argument by demonstrably false, even though unintentional, represer ations as to the evidence. Since the defendants had no way of knowing that these representations would be made, this evidence was not included in the joint appendix and reference will have to be made to the record.

The plaintiff claims in page 1 and 5 of his brief that neither he nor the defendants were aware of Jeffrey's burglary record. That a father could be unaware of his seventeen year old son's felony arrests and convictions, both being in the same household, is impossible to seriously credit, absent some evidence or testimony to support it.

". . . We recognize the perils involved in an appellate court dealing de novo with factual matters. We would not venture to do so in this case if we did not feel we have the right to take judicial notice of the facts of life. . . ".

Feldman v. Allegheny Airlines, Inc.
Court of Appeals, Second Circuit
Docket Nos. 74-2299, 74-2357
Slip Opinion-September 30, 1975.

The assertion that the defendants were likewise ignorant of Jeffrey's burglary record when they entered the Croom home (Plaintiff's Brief, pages 1 and 5) overlooks the only testimony on the point.

Defendant Freer, Record page 233.

Question: What did you know of Jeffrey Croom?

Answer: That he had been responsible for other burglaries.

Defendant Matthews, page 348.

Question: Did you have any knowledge at that time of Jeffrey Croom, yes or no?

Answer: At that time?

Question: Yes.

Answer: From previous talking to other officers, yes, that he was involved in breaks in the area.

Defendant Matthews Record page 380.

Question: You heard from other officers that he was a burglar?

Answer: True

Plaintiff, John Croom's counsel states: "There is nothing in the record to indicate that John Croom could have seen into the pantry." (Plaintiff's brief page 6) thus overlooking John Croom's own testimony on that point.

Question: Did you see any typewriters that night?

Answer: No. If they were there, I just put my garbage out, I could have saw them.

John Croom Record page 503.

Furthermore, plaintiff admitted telling the officers that he had seen the Coca-Cola in the pantry-like area.

Testimony of John Croom Record page 26.

That the pantry area, where the stolen items were found, could be seen from the kitchen where John Croom was eating his dinner was admitted also by his own witness, his son-in-law.

Question: In the kitchen closet. Is that a closed closet or an open pantry-like area?

Answer: It's open pantry-like.

Question: So that the Coke bottles were visible in the kitchen, you could walk in the kitchen and you could see them, is that right?

Answer: Yes.

Roosevelt Shields Record, pages 64, 65.

See also additional testimony on this point by Shields at pages 80, 90, 93 of the Record.

Reference was made to the Coke cartons because they are the only items the plaintiff and his witnesses would admit were in his house. They persistently denied that the other items stolen from Mr. Pjura were in the apartment. As pointed out in the defendant's brief, this patently false denial was rejected by the jury in finding that the entry into the apartment was reasonable.

All of the foregoing evidence is from the Plaintiff and his witnesses and, therefore, when plaintiff's counsel argues that the appeal be denied because of the jury's prerogative in selecting between conflicting testimony on these points, he argues a conflict which doesn't exist.

Counsel states at page 6 of his brief that "the defendants themselves admitted that the sole and only basis for arresting John Croom was that he happened to be the lessee of the apartment. . . .".

He thus omits the answer he obtained from defendant, Matthews, when he asked him that very question.

Question: What if anything did he do during that five to ten minutes to lead you to believe that this man was properly subject to being handcuffed and arrested?

Answer: After talking to his son, Jeffrey, I then went over and talked to Mr. Croom and I asked him if he had any idea how these items came into the house and he stated to me that he had just come home and he observed his son, Jeffrey, and a friend of his carrying items into the house, but he didn't know what they were.

Question: That is the basis on which you arrested Mr. John Croom?

Answer: Yes, because it was his apartment, yes.

Also ignored is the testimony of Sgt. Pastor, the ranking arresting officer who was not a defendant only because plaintiff had failed to serve him, although permission to cite him and other as additional defendants had been granted. (See pleadings on file.)

Question: What did John Croom do that justified, as far as you were concerned, your participation in his arrest?

Answer: Well he had these properties, articles that were apparently stolen they were there with his approval, his knowledge, he saw his son and friend bringing these articles into the house.

Pastor, Record page 415.

Thus, the facts known to the defendant and their superior arresting officer justified not only probable cause but even a conviction under holdings of the Supreme Court previously cited by defendants in their brief.

> Wilson v. U.S., 162 U.S. 613, 619 (1895);
> Rugendorf v. U.S., 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed. 2d 887 (1964).

Plaintiff characterizes a report filed after the arrest as "admittedly false" (Plaintiff's Brief, page 2). It is fair argument to characterize the report as false but it is not fair to characterize it as "admittedly false" unless the defendants did so admit. The record discloses that plaintiff's counsel questioned the defendants at some length about the anonymous caller and both defendants and Sgt. Pastor testified that they had independently collaberated the information from the caller and

further that the dispatch officer informed them that the caller was the woman who had called on previous occasions. Defendant Matthews testified:

Answer: I believe this party who had called was a reliable source and that's when we knocked on the door--.

Matthews-Record page 382.

II

MAY THE COURT, WITH APPROPRIATE INSTRUCTIONS, RESUBMIT TO A JURY AN APPARENT CONFLICT BETWEEN THE ANSWERS TO SPECIFIC INTERROGATORIES AND A GENERAL VERDICT AWARDING DAMAGES FOR VIOLATION OF CIVIL RIGHTS?

The various authorities on this issue have been adequately explored, however, the plaintiff has ignored the defendants' principal argument that in view of the testimony of the plaintiff's witnesses, it was an abuse of the discretion conferred by Rule 47 (b) to resubmit the interrogatories to the jury for further consideration rather than enter judgment based on the answers to the special interrogatories.

Supplement to the Record
pages 589, 590

III

IS IT PROPER, AND INDEED ESSENTIAL, FOR THE JURY TO BE INFORMED OF THE DISPOSITION OF CRIMINAL CHARGES AGAINST THE PLAINTIFF IN AN ACTION CLAIMING, INTER ALIA, VIOLATION OF CIVIL RIGHTS ON ACCOUNT OF A FALSE ARREST AND FALSE IMPRISONMENT?

Plaintiff argues that his action was in the nature of a malicious prosecution suit as in an old Connecticut case, Fusario v. Cavallaro, 108 Conn. 40, 42; 142 Atl. 391 (1928).

To the contrary, this is an action based upon a federal statute wherein the plaintiff claims violation of the Federal constitutional freedom from unreasonable entry into his home and from warrantless arrest without probable cause. The interrogatories to the jury never presented any other issues nor did the evidence.

It is simply basically unfair that defendant police officers be confronted with the actions of a state prosecutor over whom they have no control or privity.

> ". . . The defendants were city police officers not directly employed by the state; they had no measure of control whatsoever over the criminal proceeding and no direct individual personal interest in its outcome. In these circumstances there was no privity sufficient to invoke the doctrine of collateral estoppel. Cf. Williams v. Cambridge Mutual Fire Insurance Co., 230 F. 2d 393 (5th Cir. 1956). Accordingly we find no merit in appellant's further contention that the District Court failed to give full faith and credit to the state determination."
>
> Davis v. Eide, 439 F. 2d 1077, 1078 (1971)

IV

CONCLUSION

Since the jury rendered a verdict contrary to its original findings and contrary to the overwhelming weight of the evidence, judgment should be entered for the defendants.

RESPECTFULLY SUBMITTED,

DEFENDANTS-APPELLANTS

By _____
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This is to certify that two copies of the foregoing were mailed to Burton M. Weinstein, postage prepaid.

_____
James M. Kearns